

STATE OF MICHIGAN
COURT OF APPEALS

In re HINES/NEAL, Minors.

UNPUBLISHED
December 15, 2015

No. 326780
Macomb Circuit Court
Family Division
LC No. 2014-000137-NA

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

Respondent-appellant mother (“respondent”) appeals as of right the trial court’s order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(b) (parent caused physical injury or abuse), (c)(i) (conditions of adjudication continue to exist), (g) (failure to provide proper care or custody), (j) (reasonable likelihood the child will be harmed if returned to the parent’s home), and (k)(iii) (parent abused the child or a sibling and the abuse included battering, torture, or other severe physical abuse). We remand for further proceedings consistent with this opinion.

I. FACTS

Respondent is the mother of five children, only three of whom are at issue in this appeal. Petitioner filed a petition requesting termination of respondent’s parental rights to all five children at the initial dispositional hearing after five-month-old RJN was diagnosed with multiple bone fractures at various stages of healing, which doctors attributed to child abuse. Respondent’s two oldest children, JDS and JES, were dismissed from the petition after the court awarded their father sole legal and physical custody of the children. Respondent M. Hines is the legal father of the three youngest children, BEH and twins ODN and RJN. The court also terminated M. Hines’s parental rights, but he has not appealed that decision and is not a party to this appeal.

While respondent and M. Hines were married, M. Hines allowed his adult son, N. Hines, to live with them. N. Hines and respondent eventually became romantically involved. M. Hines eventually left the house, but later returned and assaulted respondent with a machete, allegedly in the presence of BEH. M. Hines was convicted of unlawful imprisonment and felonious assault

for the attack, for which he was sentenced to concurrent prison terms of 50 to 180 months for the unlawful imprisonment conviction and 12 to 48 months for the felonious assault conviction.¹

During M. Hines's incarceration, respondent and N. Hines took the twins to a pediatrician for a wellness check on March 20, 2014. This was the twins' first visit to a pediatrician since their birth in October 2013. The pediatrician noticed a lump on RJN's left leg and advised respondent to proceed to the hospital to obtain an x-ray. Respondent did not obtain an x-ray as instructed and ignored the repeated attempts of the pediatrician's office to contact her to inquire about the child's condition. The pediatrician contacted then Child Protective Services (CPS), and a CPS worker made an unannounced visit to respondent's home. On April 1, 2014, respondent obtained the x-rays. The x-rays revealed that RJN had multiple fractures in various stages of healing. An examination of ODN revealed a hematoma on his forehead. Respondent and N. Hines reported that they were the primary caregivers for the children, but they had no explanation for the injuries. Eventually, they offered several explanations, including that RJN had tipped over out of a car seat or that respondent's seven-year-old autistic son may have caused the injury. Medical personnel rejected these explanations as possible causes of RJN's fractures, and subsequent evaluations ruled out possible medical or genetic causes. RJN did not incur any additional fractures after he was placed in foster care. Petitioner filed a petition to terminate the parental rights of respondent and M. Hines at the initial dispositional hearing. Respondent and M. Hines pleaded no contest to the allegations in the petition for adjudication purposes only.

At the dispositional hearing, the trial court concluded that respondent's no contest plea also served to establish the statutory grounds for termination as alleged in the petition and also ruled that hearsay evidence was admissible at the hearing. The trial court record reveals that the court believed that the issue of the statutory grounds for termination was resolved through respondent's plea and that the subsequent hearings pertained to the issue of best interests. Consequently, in its opinion and order issued after the hearing, the trial court did not separately address whether clear and convincing evidence established a statutory ground for termination, concluding instead that respondent's "no contest plea[] established the statutory bases for terminating [her] parental rights to [the minor children]." The court thereafter addressed the children's best interests and concluded that termination of respondent's parental rights was in the children's best interests."

II. NO CONTEST PLEA

We agree with respondent's argument that the trial court misunderstood the nature of the dispositional hearing. It erroneously believed that respondent's previous no contest plea served to establish the statutory grounds for termination, thereby relieving petitioner of its obligation to prove a statutory ground for termination by clear and convincing evidence, and this error also caused the court to erroneously rule that hearsay evidence was admissible at the termination hearing. Accordingly, for the reasons stated below, we remand this case to the trial court for

¹ M. Hines did not believe that he was the biological father of the twins. Instead, N. Hines believed that he was the biological father of the twins.

reconsideration of its decision in recognition of petitioner's burden of proof by clear and convincing evidence and for issuance of appropriate findings of fact and conclusions of law regarding the statutory grounds for termination, premised on legally admissible evidence.

The interpretation of a statute presents a question of law that an appellate court reviews de novo. *In re LE*, 278 Mich App 1, 17; 747 NW2d 883 (2008). The proper interpretation and application of a court rule also presents a question of law that is subject to de novo review. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008). We review for clear error a trial court's findings of fact in a termination of parental rights case. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). "A finding is 'clearly erroneous' if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Id.*

Child protective proceedings are divided into two different phases known as the adjudicative phase and the dispositional phase. *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). The adjudicative phase merely involves the court's determination whether a statutory basis for exercising jurisdiction over the minor child exists. *Id.* The acquisition of jurisdiction and the burden of proof at the adjudicative stage is addressed in *In re PAP*, 247 Mich App 148, 152-153; 640 NW2d 880 (2001), as follows:

In child protective proceedings, the trial court must first determine whether it may exercise jurisdiction over the child. "To acquire jurisdiction, the factfinder must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2[.]" The procedural safeguards used in adjudicative hearings protect parents from the risk of erroneous deprivation of their liberty interest in the management of their children. Jurisdiction over a minor child is acquired by trial, plea of admission, or plea of no contest. Parents may demand a jury determination of the facts in the adjudicative phase of child protective proceedings. "If the court acquires jurisdiction, the dispositional phase determines what action, if any, will be taken on behalf of the child." The termination of parental rights requires further dispositional hearings and proof of the statutory [grounds] for termination by clear and convincing evidence. [Citations omitted; first alteration in original.]

Once the court acquires jurisdiction over the child, the dispositional phase occurs. *In re AMAC*, 269 Mich App at 536. The dispositional phase determines what action, if any, must be taken on behalf of the child. *Id.* at 537-538. A court may not deprive a respondent of her right to a dispositional hearing. *Id.* at 538.

Generally, the rules of evidence apply at the adjudicative phase, but do not apply at the dispositional phase. *In re AMAC*, 269 Mich App at 537. However, application of the rules of evidence differs when, as in this case, termination is requested at the initial dispositional hearing. MCR 3.977(E) addresses termination of parental rights at initial disposition, and provides:

The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if

(1) the original, or amended, petition contains a request for termination;

(2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;

(3) *at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence* that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

(a) are true, and

(b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n);

(4) termination of parental rights is in the child's best interests. [Emphasis added.]

Thus, when termination is sought at the initial dispositional hearing, "clear and convincing, legally admissible evidence [is] required to establish the grounds for termination." *In re Utrera*, 281 Mich App at 17-18. The trial court must state on the record or in writing its findings of fact and conclusions of law addressing whether parental rights should be terminated. MCL 712A.19b(1); MCR 3.977(I)(1). The facts presented at the plea proceedings may be considered as *evidence* of the statutory grounds for termination. MCR 3.977(E)(3).

In this case, the trial court erred in concluding that respondent's previous no contest plea served to establish the statutory grounds for termination. The record of the plea proceeding discloses that the prosecutor expressly informed the court that respondent had agreed to plead no contest "for adjudication purposes only." The prosecutor later repeated, "As I said, for adjudication purposes only to have the children made temporary court wards." Consistent with this understanding, in advising respondent of the consequences of her plea, the trial court referee stated:

And because you are not having the trial you give up the rights that you would have during the trial, and those rights include to have the prosecutor prove that the allegations in the petition are true *by a preponderance of the evidence*. [Emphasis added.]

The referee further advised respondent that because of her plea, the children will become temporary court wards and "the Court also then has the authority to review this matter and we are going to be setting it for a disposition."

MCR 3.971(B) addresses pleas of admission or no contest and provides, in relevant part:

Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:

- (1) of the allegations in the petition;
- (2) of the right to an attorney, if respondent is without an attorney;
- (3) that, if the court accepts the plea, the respondent will give up the rights to
 - (a) trial by a judge or trial by a jury,
 - (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
 - (c) have witnesses against the respondent appear and testify under oath at the trial,
 - (d) cross-examine witnesses, and
 - (e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;
- (4) *of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent.*^[2] [Emphasis added.]

The plain language of MCR 3.971(B)(4) indicates that a plea of no contest can later be used “as evidence” in the dispositional phase, including a proceeding to terminate parental rights, but it does not state that a plea of no contest relieves a petitioner of its burden of establishing a statutory ground for termination by clear and convincing, or relieves the court of its obligation under MCR 3.977(E)(3) to find “on the basis of clear and convincing legally admissible evidence” that a statutory ground for termination under MCL 712A.19b(3) has been established before it can terminate parental rights.

Nothing in the record of the plea proceeding indicates that respondent agreed to plead no contest for the purpose of establishing a statutory ground for termination or that her plea was intended to relieve petitioner of its obligation to prove a statutory ground for termination by clear and convincing evidence. On the contrary, the prosecutor expressly represented that the plea was for adjudication purposes only and, consistent with that representation, the referee advised

² We note that the record of the plea proceeding discloses that the referee never informed respondent that her plea could later be used as evidence in a proceeding to terminate parental rights. “Ordinarily, we do not address issues not raised below or on appeal, or issues that were not decided by the trial court.” *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004). We decline to address whether the failure to relay this information to respondent during the plea proceeding renders her plea fatally defective in light of the fact that respondent does not raise the issue on appeal. See *id.*

respondent that by pleading no contest, she was giving up her right to have petitioner prove that the allegations in the petition were true by a *preponderance of the evidence*. Thus, acceptance of the plea merely alleviated petitioner's burden of proving a statutory basis for jurisdiction by a preponderance of the evidence. See MCR 3.971(B)(3)(b). Because of its misunderstanding, the trial court never issued any findings regarding the existence of a statutory ground for termination. Under these circumstances, it is necessary to remand this case to the trial court for reconsideration of its decision in recognition of petitioner's burden of proof by clear and convincing evidence, and for issuance of appropriate findings and conclusions of law regarding the statutory grounds for termination.

Respondent also argues that the trial court erroneously allowed hearsay evidence to be admitted at the dispositional hearing. Respondent refers generally to medical reports, test results, and out-of-court statements of medical and social workers, which she contends constituted inadmissible hearsay. Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c).

The trial court did not address the purposes for which evidence was offered, or otherwise resolve whether challenged evidence was inadmissible hearsay, because it erroneously believed that hearsay evidence was admissible. As indicated, the court's conclusion that hearsay evidence was admissible is contrary to MCR 3.977(E). In addition, because the trial court did not issue any findings of fact regarding the statutory grounds for termination, we cannot determine whether any improper admission of hearsay evidence was harmless. Because we are remanding this case, we direct the trial court on remand to afford the parties an opportunity to address any evidence alleged to be inadmissible hearsay, and we direct the trial court to resolve those challenges. The trial court shall limit its decision on remand to only legally admissible evidence. Because we are retaining jurisdiction, we decline to address respondent's remaining issues at this time.

Remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Kathleen Jansen

/s/ Mark J. Cavanagh

Court of Appeals, State of Michigan

ORDER

In re Hines/Neal Minors

Kathleen Jansen
Presiding Judge

Docket No. 326780

Mark J. Cavanagh

LC No. 2014-000137-NA

Elizabeth L. Gleicher
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED to the trial court for findings of fact and conclusions of law regarding the statutory basis for termination of respondent-appellant's parental rights.

The trial court incorrectly concluded that respondent-appellant's no contest plea with regard to the statutory basis for jurisdiction established the statutory basis for termination of her parental rights without making independent findings of fact on the statutory basis for termination by clear and convincing legally admissible evidence. On remand, the trial court must determine whether, on the basis of clear and convincing legally admissible evidence, the facts alleged in the petition are true and establish a statutory basis for termination. MCR 3.977(E)(3). The trial court must afford the parties an opportunity to address any evidence alleged to be inadmissible hearsay and resolve the challenges to the evidence.

Proceedings on remand in this matter shall be conducted within 60 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings. The parties may file a supplemental brief on appeal within 21 days after completion of the proceedings on remand.

We retain jurisdiction.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 15 2015

Date

Chief Clerk